

"undue" or "excessive" references to particular brands. However, both networks concede that as a practical matter it is impossible to eliminate product references from motion pictures over which the network itself did not have creative control.²⁴

In sum, product placements are so persuasive that they have become part of a complex, sophisticated industry. Realizing that placement agencies were making millions, studios have demanded a greater "piece of the action" through multi-faceted deals arranged by new "entertainment marketing" companies.²⁵

In exchange for placement, studios now typically expect not merely goods or services to reduce film production costs, but also promotional services by the advertisers to reduce the studios' marketing costs -- which now nearly equal production costs.²⁶ Advertisers whose products appear in films pay the studios licensing royalties, then launch product "tie-in" campaigns, sometimes in the \$10 million range, jointly promoting their own products and the films.²⁷ These "back-end" promotions, ever more

²⁴ Telephone conversations between Matthew Margo, CBS Program Practices, and Charles Mitchell, CSPI (Dec. 14, 1988); between Christine Hikawa, ABC Vice President for Broadcast Standards and Practices, East Coast, and Mitchell (Dec. 20, 1988); and between Robin Graham, editor of theatricals for ABC, and Mitchell (Dec. 20, 1988).

²⁵ Krasnoff, "Focus on Product Placement: From a Simple Idea to a Complex Advertising Tool," The Hollywood Reporter, June 10, 1986, p. S-23.

²⁶ Id.

²⁷ Id.; "Robert Kovoloff: Product Placement Pioneer," The Hollywood Reporter, June 10, 1986, p. S-30 - S-32, gives these examples:

o ". . . [I]n return for the Anheuser-Busch placement [in

important and lucrative, are sometimes even undertaken by advertisers whose products do not actually appear in the film.²⁸

D. Undisclosed product placements in contemporary feature films are contrary to the public interest

1. All such placements violate the statutory principle that material broadcast in exchange for valuable consideration should be identified.

Undisclosed product placements contradict the public interest because they constitute exactly the kind of hidden advertising which section 317 and its implementing regulations were meant to prevent. Based on the well-established principle that consumers "are entitled to know by whom they are being persuaded, . . . there has been an unvarying requirement that all matter broadcast

'Jewel of the Nile'], the company gave 20th Century Fox full-page, four-color advertisements in USA Today and Sports Illustrated."

o "In 'Karate Kid: Part II' there is a major Back-end promotion by our clients, Nestle and Panasonic, on MTV, which is worth upward of seven figures in advertising value."

o "For 'Poltergeist II,' which has Dunkin' Donuts in a kitchen sequence, that company expended close to a million dollars by including a full-page, free-standing insert in Sunday newspapers in most major markets in the U.S. . . . The promotion also includes AFP-arranged marketing by radio, and posters in 1,500+ Dunkin' Donut retail outlets."

Kovoloff continues: "We give the producer, and/or the studio, ad campaigns worth millions, for free, to help exploit their film. This is in addition to supplying what they need for the actual production."

²⁸ See, The Hollywood Reporter, June 2, 1987, supra n. 19, pp. S-15, S-16 (product promotion using well-known movie character can work even if product is not placed in movie; Kovoloff says that during 1986-87 the trend was toward more back-end promotion); New York Times, Oct. 29, 1985, supra n. 8, p. D25; Fitzgerald and Erickson, "'Willow' stirs promo frenzy," Advertising Age, May 16, 1988, p. 1 (numerous promotional tie-ins with new fantasy film).

by any station for a valuable consideration is to be announced as paid for or furnished, and by whom." 26 Fed. Reg. 3,781 (1961).²⁹ Yet, the players in this industry openly aim to influence viewers without the viewers' realizing that commercial marketing is taking place.

- a. Placements in motion pictures employ many practices the Commission has said should require sponsorship announcements.

Many recent movies include product placements that are indistinguishable from some of the 27 specific examples, in the 1960 House report and 1963 Commission public notice³⁰, of practices that identify products or brand names beyond what is "reasonably related"³¹ to use on the broadcast. These examples authoritatively interpret Congress's intent in amending section 317. See National Ass'n for Better Broadcasting v. F.C.C., 830 F.2d 270, 276-77 (D.C. Cir. 1987). In any other broadcast or origination cablecast program, these placements would have to be announced.

²⁹ See also 34 F.C.C. 829, 831 (1963) (purpose of Section 317 is "to inform listeners of the identity of those who are attempting to persuade them").

³⁰ See opening paragraph of Section II, pp. 7-8 and n. 5, supra.

³¹ See 47 U.S.C. Section 317(a), set forth on pp. 4-5, supra, and 47 C.F.R. §§ 73.1212(a), 76.221(a), similarly requiring announcement of product identifications not "reasonably related" to use on the broadcast, pp. 6-7, supra.

Recent prominent mentions of advertisers' brand names, a practice the Commission said requires an announcement,³² include the following:

- Charlie Sheen holding up a copy of Fortune magazine and referring to it as "the Bible." ("Wall Street") Fortune reportedly outbid Forbes magazine for the opportunity to make this plug.³³
- Alan Alda saying, "Let me have a Cutty Sark." ("A New Life")³⁴
- Shirley MacLaine telling Jack Nicholson, "I'd prefer to have a Wild Turkey." ("Terms of Endearment")³⁵

³² See 40 F.C.C. 141, 145-47 (1963), examples B.6. (payment for broadcast mention of airline name), B.8-9 (car furnished, not for broadcast use, in exchange for broadcast mention), C.14. ("If . . . in return for the use of the [hotel] premises, the producer agrees to mention the hotel in a manner not reasonably related to the use made of the hotel on that particular program, an announcement would be required."), C.17. (" . . . [A]n announcement would be required if the car is loaned in exchange for a mention . . . such as . . . 'If you hadn't had that speedy Chrysler, you never would have caught me.'"), D.22. (announcement required if there is broadcast mention of a furnished refrigerator's brand name, which is "not reasonably related" to the refrigerator's use on a dramatic program), D.23.(b) and D.25.(c) (broadcast mentions praising the product).

³³ "The Not-So-Hidden Persuaders," Washington Post (Jan. 1, 1989), p. H1.

³⁴ "Bar management trends: Plugola in film pays off in recalls," Nation's Restaurant News, Bar Management Supplement (Sept. 5, 1988), p. 4.

³⁵ "Staying Ahead of the Trends: An Interview With Robert Kovoloff," The Hollywood Reporter, June 2, 1987, p. S-16.

- Marlon Brando telling George C. Scott, "Have some Milk Duds. They're good for you." ("The Formula")³⁶
- Sylvester Stallone urging his son to eat Wheaties. ("Rocky III")³⁷

Another technique that should trigger disclosure is illustrated by the enlarged and repositioned logo on a Codaphone product³⁸ in "The Telephone," starring Whoopi Goldberg. A similar technique,³⁹ the "extreme close-up," utilized in "Superman II," depicted Christopher Reeve's Timex watch.⁴⁰

Still other product placement practices ought to trigger an announcement because, in one way or another, they use the advertisers' products "to an extent disproportionate to the subject matter of the film."⁴¹ Food and beverage products such as

³⁶ "Marketing through movies," Marketing Communications, July 1981, p. 7.

³⁷ Cannon, "A Word From the Sponsor: Matthau's Nikon Goes Clink, Clink," Los Angeles Times, May 11, 1982, Business p.1.

³⁸ PR Week, May 16-22, 1988, supra n. 8, p. 10.

³⁹ See 40 F.C.C. at 148, example 27(a) (announcement required where manufacturer insists that "enlarged insignia of its brand name" be depicted on grand piano furnished for broadcast).

⁴⁰ Pietschmann, "And Maybe He Should Be Smoking a Virginia Slims," Los Angeles Magazine, (Oct. 1981), p. 172. Cf. 40 F.C.C. at 148, examples D.24(b) and D.27.(b) (announcement required if closeup is taken of, or "undue attention" is given to, the advertiser's insignia).

⁴¹ See 40 F.C.C. at 148, example 27(c) (" . . . [I]n this case by the use of the film the broadcaster has impliedly agreed to broadcast an identification beyond that reasonably related to the subject matter of the film.").

Lone Star beer in "Urban Cowboy," Cheerios in "Superman II," Milk Duds in "Seems Like Old Times", and Bertolli Olive Oil in "North Dallas Forty" have been used "elaborately" and "extravagantly" at the behest of the manufacturers and their agents.⁴² Three pieces of Marlboro paraphernalia -- a taxicab top sign, an illuminated sign, and a truck into which Superman is thrown by a villain -- appear in a single "Superman II" fight scene that has nothing to do with cigarettes or smoking. Some Columbia Pictures and Tri-Star Pictures films are riddled with verbal and visual plugs for Coke, which is made by Columbia's parent and Tri-Star's one-third owner.⁴³ Other advertisers arrange for strategic rather than pervasive exposure, through depicting their billboards (such as Pacific Bell's in "Star Trek IV"⁴⁴) or commercials (such as those watched by Peter Sellers in "Being There"⁴⁵) during memorable scenes.

⁴² Los Angeles Magazine, Oct. 1981, supra n. 40, pp. 172, 174.

⁴³ See, e.g., PR Week, May 16-22, 1988, supra n. 8, at 10 ("gratuitous shots" of Coke in Bill Cosby's "Leonard Part 6"); New York Daily News, Mar. 28, 1985, supra n. 12, ("The Slugger's Wife" is filled with references to Coke and Coke paraphernalia.); Washington Post, Aug. 18, 1985, supra n. 14, at H5 (citing "St. Elmo's Fire," "Rambo," and "Volunteers" as further examples).

⁴⁴ Ainis and Vaughn, "Placing Product With a New York Accent," The Hollywood Reporter, June 2, 1987, p. S-24.

⁴⁵ Los Angeles Times, May 11, 1982, supra n. 37, Business, p. 1.

Finally, providing advertisers' products as refreshments for cast and crew⁴⁶ is another practice that the Commission has said ought to trigger announcements. This practice amounts to furnishing, in exchange for placement in the televised material, more of the advertisers' product than is needed for use in the material itself.⁴⁷

The use of "back-end" promotional tie-ins, an innovation developed since the Commission set forth its examples, also should trigger an announcement. Where they accompany product placements not "reasonably related" to the products' uses in movies, joint product-movie promotions amount to additional "service or other valuable consideration" paid for the matter broadcast within the meaning of section 317.

b. Product placements in movies intentionally exploit unsuspecting audiences.

The case for rescinding the feature films waiver is even stronger considering that the placement industry's very purpose is to exploit viewers' unawareness that they are watching advertising. Nothing could be more clearly within the concern that section 317 was meant to address.

Marketers target film placement because they know that the moviegoer typically suspends the attitude of suspicion with which

⁴⁶ See n. 14, *supra*. See also Los Angeles Magazine, *supra* n. 40, p. 172 (Robert Kovoloff of Associated Film Promotions says, "Obviously, we give them beer. We've got to give them beer or we'd be laughed out of town.")

⁴⁷ See 40 F.C.C. 141, 145 (example B.7.), 146 (example C.10.) (1963).

he or she often views overt commercials.

"Having 'somebody like Burt Reynolds using a product in a real-life setting,' Mr. Kovoloff believes, 'isn't like a TV commercial where viewers suspend belief. And think of what happens when the movie then goes on cable and network television -- all those free spots!'"⁴⁸

"Because the movie-going audience walks into the theatre wanting to be entertained, they walk in with an open mind. Participating at their own discretion then, the audience views products associated with the entertainment openly and enthusiastically. Alta Marea Productions and Dentsu can offer clients the opportunity to reach this impressionable audience."⁴⁹

A studio executive simply calls this "sort of subliminal advertising."⁵⁰ A critic of product placement lends further credence to all these practitioners' views of their work:

"What makes this form of advertising especially powerful is that most people don't think about the fact that it is advertising. . . . Surveys overwhelmingly reveal that the people polled believe that advertising is misleading, and that it doesn't tell the truth. Since people don't think of product placements as advertising, they don't discount what they see."⁵¹

This tendency to not perceive placements as advertising may be accentuated when films appear on television, where frequent commercials reinforce the illusion of clear separation between

⁴⁸ Wall Street Journal, May 24, 1982, supra n. 12, p. 12.

⁴⁹ Promotional videotape for Alta Marea Productions (available in 1985).

⁵⁰ Rusty Citron, senior vice president of publicity and promotion at New World Pictures, quoted in PR Week, May 16-22, 1988, supra n. 8, p. 11.

⁵¹ Michael Schudson, professor of sociology and communications at the University of California at San Diego, quoted in Nutrition Action Health Letter, Exhibit 4, supra n. 17, at 4-5.

entertainment and advertising.

Placements are carefully designed to make a product seem "natural"⁵² or like it "belongs"⁵³ in a situation. What viewers really see is a careful positioning shaped by the suggestions of agencies (who review scripts in advance) and by the approval of advertisers.⁵⁴ While placement specialists say the prominent depiction of name-brand products makes a movie more realistic than a film filled with generics,⁵⁵ the version of reality depicted is molded by the image of the product that the advertiser wants to project.⁵⁶ Placements link products with the film hero⁵⁷, keep

⁵² Krasnoff, "A Creative View of Product Placement," The Hollywood Reporter, June 2, 1987, p. S-20.

⁵³ Grove, "The economics of using the real thing," Los Angeles Herald Examiner, Sept. 13, 1979, p. A-14.

⁵⁴ Marketing Communications, July 1981, supra n. 36, p. 7 ("Clients approve every script and receive a complete breakdown on how products will be used," notes Robert Kovoloff of Associated Film Promotions); Pietschmann, "'And Maybe He Should Be Smoking a Virginia Slims,'" Los Angeles Magazine, supra n. 40, pp. 177-78 (Kovoloff and Steve Werner of Alta Marea Productions have access to scripts "far in advance of production," and this is "the key to their success."); New York Times, Oct. 29, 1985, supra n. 8, p. D25 (Tri-Star Pictures and Paramount Pictures supply Scott Dorman of Diener/Hauser/Bates with scripts of upcoming films and "he seeks likely spots for products."); PR Week, May 16-22, 1988, supra n. 8, at 11 (Frank Devaney of Rogers & Cowan "regularly goes through film scripts looking for the opportunities").

⁵⁵ See, e.g., the articles cited in nn. 52-53.

⁵⁶ See generally How to cast your product in the movies, Associated Film Promotions brochure (1987), (Exhibit 6, p. 4) ("The Services provided by Associated Film Promotions" describing AFP's activities and the control it exercises over placement of the clients' products). See also "Robert Kovoloff: Product Placement Pioneer," The Hollywood Reporter, June 10, 1986, p. S-3 ("We're not going to let them go into a film if it's not reaching the market that they define to us. We're not going to put them

them away from the villain,⁵⁸ and keep brand names out of controversial topics or films.⁵⁹

Thus, the so-called "natural" appearance of products, without any sponsorship identification, is especially insidious because it masks the fact that their image represents what the advertisers want and have paid to project.

2. The messages conveyed about cigarettes and alcoholic beverages are particularly contrary to the public interest.

The many alcoholic beverage and cigarette brands placed in movies present a particular threat to the public interest.

Impressionable viewers, especially young people, may be swayed to emulate screen idols who are linked with the sponsors' alcohol or

in a film if their product is to be depicted in a negative rather than a positive manner."); 1983 AFP promotional brochure, Exhibit 5, supra n. 20 ("A Letter from the President") ("AFP carefully controls the appearance of the client's product in films. In most cases, it is the stars who will use the product - always in a positive and memorable manner. Great care is taken to prevent a product from being used by 'villains' or in a disparaging way.").

⁵⁷ See 1983 AFP promotional brochure, Exhibit 5, supra n. 56 (Kovoloff's letter to prospective clients repeatedly stresses that the product will mostly be used by the "stars"); Wall Street Journal, May 24, 1982, p. 1 (Stallone eats Wheaties in "Rocky III;" Redford grabs Hormel Hot Chili in "The Electric Horseman."); New York Times, Nov. 15, 1982, supra n. 10, p. C11 (Product placers made sure that Matthau played a competent spy, not a bumbler, before furnishing a Nikon camera for "Hopscotch.").

⁵⁸ Wall Street Journal, May 24, 1982, supra n. 12, p. 1 (Mercedes-Benz says it has a "rule of thumb" that "the bad guy never drives a Mercedes.")

⁵⁹ Id. (Anheuser-Busch decided not to try to place Budweiser in bar scenes of "Making Love," a film about a gay romance.).

tobacco products. Placements of these products cultivate habits that threaten public health.

It is significant that a leading placement agency, listing "the benefits of motion picture product placement," begins by saying that viewers tend to emulate stars, choosing two alcoholic beverage placements as examples:

"1. People identify with motion picture stars and seek to emulate them. Whether it be Shirley MacLaine asking for Wild Turkey in "Terms of Endearment," or Matthew Broderick drinking Budweiser in "Project X," audiences across America are tremendously influenced by the messages they receive from the movie screen. When a personality on the movie screen opens the closet, you see what is on the shelf, you see what clothes they wear, the food they eat, and a multitude of products which are part of their environment. These ever so subtle endorsements may be viewed as EDITORIAL COMMENTS as opposed to paid advertising."⁶⁰

The unspoken sales pitch, intended by the placement salesman and understood by the placement customer, is that young people -- the most frequent, most impressionable moviegoers -- are especially likely to be "tremendously influenced" and to "emulate" the star who drinks the sponsor's brand.

Undisclosed placements of alcoholic beverages in movies aimed at teenagers inherently contradict the public interest. The most obvious and offensive are placements in movies that glorify underage drinking, drunkenness, drinking and driving, and the like. Confronted with criticism of "Spring Break," a 1981 picture

⁶⁰ How to cast your product in the movies, Exhibit 6, *supra* n. 56, p. 5 (emphasis in original). The cover of this glossy brochure, featuring four cut-outs (including Bud Light and Spuds McKenzie), opens to reveal movie scenes in which each was placed. Budweiser is featured in other scenes depicted elsewhere in the brochure.

that portrays the Miller Beer logo numerous times while glamorizing binge drinking, drinking and driving, and drinking to facilitate boys' sexual conquest of girls, Miller Brewing Company replied that it had since adopted guidelines that purport to exclude participation in movies that portray alcohol abuse, particularly among young people.⁶¹ Anheuser-Busch and its placement agency claim to have a similar policy.⁶² However, plugs for movies that feature placements of Miller products remain a part of that company's "Spring Break" promotions aimed at college students, most of them under the now universal legal drinking age of 21.⁶³

Even if producers succeed in their self-regulatory efforts, the covert placement of alcoholic beverages remains objectionable for several reasons. First, such placements in movies targeted at or largely viewed by youth constitute advertising to an audience, much of which cannot legally purchase the products advertised. Second, moviegoers' recall of alcoholic beverage brands may be significantly higher than of other products.⁶⁴ Third, regardless of the age of the audience, when the products depicted are hard

⁶¹ See letter from Joe B. Tye to Phillip Morris Companies, Inc. (Jan. 17, 1987), and reply to Tye from Miller Brewing Company (Mar. 3, 1987), Exhibit 2.

⁶² Wall Street Journal, May 24, 1982, supra n. 12, p. 12 ; New York Times, Aug. 20, 1981, supra n. 22, p. D16.

⁶³ See Miller's promotional poster, Exhibit 7.

⁶⁴ Nation's Restaurant News, Bar Management Supplement, supra n. 34, p. 4 (Recall rate for most products is about 35%, for alcoholic beverages about 46%).

liquor (e.g., Wild Turkey in "Terms of Endearment,"⁶⁵ Absolut vodka in "St. Elmo's Fire,"⁶⁶ and Glenfiddich Scotch in "The Dogs of War"⁶⁷) television broadcast of the placement in effect violates the liquor and broadcasting industries' voluntary policy of not advertising distilled spirits on television. Finally, the problem of hidden persuasion may actually be worsened when alcoholic beverage producers secretly shape the manner in which their brands and other alcoholic beverages are portrayed in films.

Today's more subtle placements indoctrinate young people with portrayals, carefully tailored and sanitized by beverage producers and their agents, that divorce the sponsors' products from problems that result from alcohol use in the real world. Two recent federal government reports discussing alcohol and health, using the most current data available, indicate that use of alcoholic beverages contributes to nearly 100,000 deaths and results in medical and social costs of \$117 billion annually.⁶⁸ Monitoring of prime-time television, however, reveals pervasive

⁶⁵ See p. 22 and n. 35, supra.

⁶⁶ Nutrition Action Healthletter, Exhibit 4, supra n. 17, p. 4.

⁶⁷ Los Angeles Magazine, Oct. 1981, supra n. 40, p. 172.

⁶⁸ U.S. Department of Health and Human Services, Public Health Service, The Surgeon General's Report on Nutrition and Health (1988), p. 632; U.S. Department of Health and Human Services, Public Health Service, Alcohol, Drug Abuse and Mental Health Administration, National Institute on Alcohol Abuse and Alcoholism, Sixth Special Report to the U.S. Congress on Alcohol and Health (1987), pp. 5-6, 21 (based on 1980 death data and 1983 cost data).

depiction of alcohol consumption, almost never unfavorable.⁶⁹
Similar monitoring of recent movies shows similar patterns.⁷⁰

Purged of problems stemming from alcohol, films instead portray sponsors' brands as favorites of the stars,⁷¹ whom young people are especially likely to consider role models. The Commission should be concerned about an industry practice so widespread that a leading product placer boasted: "I placed Anheuser-Busch in 60 films [in 1984] and never once was the product handled by a bad guy."⁷² Viewers have a right to know

⁶⁹ "TV & Film Alcohol Research: TV Stars Drink Heavily, No Harmful Effects Shown. Alcohol's Illness & Violence Effects Censored from TV," NCTV News (Mar.-Apr. 1988), supra n. 68, p. 4 (During fall 1987, National Coalition on Television Violence "found only three out of 2,720 scenes where alcohol had any harmful consequence whatsoever."); "Film use of alcohol, tobacco still high," American Medical News (Nov. 11, 1988), p. 26 (97% of 133 films studied by NCTV encouraged drinking).

⁷⁰ NCTV News (Mar.-Apr. 1988), Exhibit 8 supra n. [previous], p. 4; "Alcohol and Drugs Flow Freely in Hollywood Films. Violence & Rape at High Levels," NCTV News (Jan.-Feb. 1988) (Exhibit 8), p. 6.

⁷¹ See, e.g., The Hollywood Reporter, June 10, 1986, supra n. 21, p. S-32 ("Jewel of the Nile" shows two leading characters enjoying Budweiser in romantic setting); New York Times, Nov. 15, 1982, supra n. 10, p. C11 (Willie Nelson enjoys sponsor's brand, troublemakers drink another, in "Honeysuckle Rose"); Los Angeles Magazine, Oct. 1981, supra n. 40, pp. 172, 174 (in "Urban Cowboy," where Lone Star was used in scenes at Gilley's, AFP still succeeded in getting Budweiser as most commonly-shown beer); New York Times, Aug. 20, 1981, supra n. 22, p. D16 (Clint Eastwood had Michelob in "Any Which Way You Can").

⁷² New York Daily News, Mar. 28, 1985, supra n. 12, p. 81. Cf. Los Angeles Magazine, Oct. 1981, supra n. 40, pp. 178-79 ("nondescript" beer is used for drinking by underage people or bad guys). Placements of Anheuser-Busch beers remain a mainstay of AFP's business, and a heavily-featured part of AFP's sales pitch. See 1987 promotional brochure, Exhibit 6, at pp. 1, 2, 4, 5.

whose agents, lawyers, marketing people, and public relations experts have tailored the images of alcoholic beverages shown in televised movies.⁷³

Placements linking film heroes and other sympathetic characters with smoking and particular cigarette brands present similar problems. Some movies are saturated with billboards and other shots of particular cigarette brands -- like the 20 references to Marlboro shown in "Superman II."⁷⁴ Philip Morris paid \$42,500 for these placements.⁷⁵ Stop Teenage Addiction to Tobacco (STAT), a non-profit organization, identifies 18 fairly recent motion pictures that it believes contain paid placements of cigarette brands.⁷⁶ A Congressional investigation recently discovered that Philip Morris paid \$350,000 to have Lark cigarettes placed in the upcoming James Bond movie, "Licensed to Kill."⁷⁷

⁷³ See Wall Street Journal, May 24, 1982, supra n. 12, p. 12 (scripts for any film in which AFP might seek to place an Anheuser-Busch beer is carefully examined by A-B's legal, marketing, and PR officials; changes suggested are often accepted).

⁷⁴ See Nutrition Action Healthletter, Exhibit 4, supra n. 17, p. 5 (quoting John W. Richards, M.D.).

⁷⁵ News Release from Congressman Tom Luken (Ohio - 1st District), "Luken Seeks Criminal Probe by Department of Justice of Cigarette Advertising in New James Bond Movie and Other Films" (Mar. 20, 1989), Exhibit 10, p. 1.

⁷⁶ See "Pushing Smokes In Kids' Movies," Tobacco & Youth Reporter (Autumn, 1988), p. 3. (Exhibit 9). STAT does not claim to have verified with the apparent sponsors that payments were made in each instance.

⁷⁷ Luken news release, Exhibit 10, supra n. 75, at 1.

STAT notes a trend toward putting cigarettes in the hands of characters with whom young people are likely to identify. In "Beverly Hills Cop," Eddie Murphy says that Lucky Strikes "are very popular cigarettes with the children" but that he smokes king-size Kents. One technique is to link the sponsor's brand with an already self-assured character: Lois Lane smokes Marlboro in "Superman II" scenes reportedly changed due to consideration paid by Philip Morris, Inc.;⁷⁸ Another device associates learning to smoke with a character's rise from weakness to self-confidence.⁷⁹

Monitoring confirms that contemporary movies overwhelmingly portray smoking in a favorable light.⁸⁰ In fact, however, cigarettes account for about 350,000 of America's annual 2 million deaths,⁸¹ and about 10% of all direct health care costs.⁸² Of

⁷⁸ Magnus, "Superman and the Marlboro woman: The lungs of Lois Lane," New York State Journal of Medicine (July 1985), pp. 342-43.

⁷⁹ See "Holy Smokes: Pushing Cigarettes in Kids' Movies," Tobacco & Youth Reporter (Summer 1986), pp. 11-12. (Exhibit 9). See also "Batteries Not Included: Cigarettes Are," Tobacco & Youth Reporter (Spring 1988), p. 6. (Exhibit 9).

⁸⁰ NCTV News, Exhibit 8, supra nn. 69-70, (Jan.-Feb. 1988) at p. 6, (Mar.-Apr. 1988) at pp. 4-5.

⁸¹ U.S. Department of Health and Human Services, Public Health Service, Office on Smoking and Health, The Health Consequences of Smoking: Chronic Obstructive Lung Disease: A Report of the Surgeon General (Publication DHHS (PHS) 81-50205) (1984), p. ii.

⁸² Letter from Blake Cady, MD, "Payment by Nonsmokers for Smoking-Related Illness," Journal of the American Medical Association 256(10): 1291, Sept. 12, 1986.

course, no warnings such as are required on print ads for cigarettes are ever visible.

E. Placements of cigarettes may violate the prohibition against cigarette advertising on television.

Tobacco companies have a special, obvious reason for using film to target the elusive youth market; since 1971, they have been forbidden "to advertise" on television.⁸³ Under the Commission's feature film exception, however, televised movies secretly convey messages that federal law forbids tobacco companies to state openly in that same medium. United States Representative Tom Luken recently wrote Attorney General Richard L. Thornburgh requesting an investigation of whether the payments that tobacco companies have admitted making for placements of their cigarette products in motion pictures violate either the prohibition of cigarette advertising on television or the requirement of a warning label in cigarette advertisements, 15 U.S.C. §1335(a) (2).⁸⁴

The Commission should assist the Justice Department in investigating whether the cigarette brand placements televised in

⁸³ "After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335.

⁸⁴ Exhibit 10, supra n. 75, at 1; Letter from Thomas a. Luken to the Honorable Richard L. Thornburgh, March 17, 1989, also in Exhibit 10. Representative Luken has also introduced legislation that would expressly prohibit most cigarette advertising that "is or may be seen or heard by any person under the age of 18," including "advertising in movie theaters." H.R. 1250, 101st Cong., §§3(a) (1), (b) (2) (A).

broadcast and origination cablecast feature films violate the prohibition against television advertising of cigarettes. The statute does not limit the definition of "advertise" to T.V. commercials, and placement practitioners themselves confirm that their work is a form of advertising.⁸⁵

The legislative history of the television advertising ban, too, compels the broadest possible interpretation of the words "to advertise." Congress intended to prohibit all paid promotion of cigarettes on television, particularly the forms of promotion that especially affect young people. The ban arose largely out of concern that pervasive cigarette ads on television, portraying smoking as socially appealing and not at all hazardous to health, especially manipulated impressionable youth.⁸⁶

Even if placements of other products were not pervasive in today's movies, the widespread use of these practices to thwart other well-established public policies regarding alcoholic beverages and tobacco would warrant rescinding the feature films exemption.

⁸⁵ See p. 26, supra ("free spots;" "subliminal advertising.").

⁸⁶ S. Rep. No. 91-566, 91st Cong. 1st Sess. (1969), reprinted in 1970 U.S. Code Cong. & Ad. News 2656 (quoting Federal Trade Commission Report), 2660 (during hearings, cigarette manufacturers stated that "with respect to all other advertising, they would avoid advertising directed to young persons"), 2665 (letter from FTC Chairman Dixon to Senate Committee Chairman Magnuson cites statistics on TV cigarette ads viewed by teenagers and children).

III. EFFECTIVE SPONSORSHIP IDENTIFICATION FOR FEATURE FILMS
BROADCAST ON TELEVISION REQUIRES ANNOUNCEMENTS AT THE
BEGINNING OF THE FILM AND WHEN SPONSORED MATERIAL APPEARS.

Television viewers will "know by whom they are being persuaded"⁸⁷ only if the Commission requires a sponsorship announcement that they are reasonably likely to see under the ordinary circumstances of viewing. The circumstances of viewing feature films on television warrant a more exacting requirement than that of one announcement "at any time during the course of the broadcast [or cablecast]" currently applicable to other television programming. 47 C.F.R. §§ 73.1213(f), 76.221 (e) (1987).

A. Current regulations do not reflect a judgment about the appropriate form of sponsorship identification for televised "feature" films.

The requirement of but one announcement, given at any time, is essentially unchanged from the original, 1944 sponsorship identification regulation, promulgated when television was in its infancy.⁸⁸ The 1944 proposal would have required announcements at

⁸⁷ See p. 20, supra (quoting 26 Fed. Reg. 3,781).

⁸⁸ 47 C.F.R. Section 3.409(e), promulgated in 9 Fed. Reg. 14,734 (1944), provided:

"In the case of programs advertising commercial products or services, an announcement stating the sponsor's corporate or trade name of the name of the sponsor's product, shall be deemed sufficient for the purposes of this section and only one such announcement need be made at any time during the course of the program."

47 C.F.R. Section 73.1212(f) (1987) now provides:

"In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of

both the beginning and the conclusion of all programs more than five minutes long,⁸⁹ but the final rule applied that requirement only to programs that were "political" or involved discussion of "public controversial issues"⁹⁰ -- a requirement which remains today.⁹¹ The Commission made this change without specifically explaining its decisions in the Federal Register, saying only generally that "certain suggested revisions of the proposed rule have been filed by different broadcasters and their representatives."⁹²

In 1963, the Commission recognized the importance of assuring that sponsorship identification effectively informs viewers, but did not consider the form of disclosure necessary in the context of "feature" film telecasts. The Commission considered, but decided not to prescribe, whether sponsorship announcements on television must be aural or visual. 40 F.C.C. at 150. The Commission left that decision to the broadcast licensee, emphasizing that the purpose of sponsorship identification rules is to "provide a full and fair disclosure of the facts of

the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast."
(Emphases added).

⁸⁹ 9 Fed. Reg. 11,969 (1944) (proposed subsection (a)).

⁹⁰ See 47 C.F.R. Section 3.409(b), (e), 9 Fed. Reg. at 14,734.

⁹¹ 47 C.F.R. Section 73.1212(d) (1987).

⁹² 9 Fed. Reg. at 14,734.

sponsorship." Id. (emphasis added). Of course, the Commission did not discuss what format might provide "full and fair disclosure" in broadcasts of "feature" films, for which the Commission waived sponsorship identification requirements.

The Commission did, however, explain in 1963 (post hoc) the special provisions for political and controversial programs, and the reasoning used is relevant here. The Commission justified the stricter identification requirements in part by noting that people were subject to broadcast political messages "to a greater extent today than ever before."⁹³ The Commission thus implied that stricter requirements might be appropriate in other situations where it is particularly difficult for the public to "know the identity of those persons or groups who solicit the public's support."⁹⁴ Product placements in today's motion pictures exactly fit this description.

B. The circumstances of viewing televised feature films warrant requiring more conspicuous disclosures.

There are several reasons why a single announcement is not sufficient to alert viewers to paid product placements in feature length films.

First, unlike most television programs, feature length films typically last at least two television hours. Closing credits of

⁹³ 34 F.C.C. at 848-49 (paragraphs 57-59).

⁹⁴ 34 F.C.C. at 849 (paragraph 59).

such films are an order of magnitude longer (in text and viewing time) than credits of normal network programs. Some movie telecasts display the credits after a series of commercials that follows the end of the actual film. Television viewers should not have to sit through the gaffer, best boy, and dolly grip to learn who has paid to subtly persuade them. Movies magnify the well-known problem that viewers are likely to miss brief disclosures at the very beginning or end of a program.⁹⁵

Second, TV viewers tend to switch channels, dipping in and out of movies. Television viewers are far less likely than theater moviegoers to sit through the beginning and end of a film, uninterrupted.

Third, movie viewers assume that entertainment and advertising material are clearly separated and therefore do not expect that feature length films contain subtle forms of paid advertising

Fourth, movies generally -- and particularly those targeted by product placements -- are disproportionately viewed by young people. As the Commission has recognized, "children, especially young children, have considerable difficulty distinguishing commercial matter from program matter."⁹⁶ The Commission has historically developed regulations to deal with "unique

⁹⁵ See Chester and Montgomery, "Counterfeiting the news," Columbia Journalism Review 38 (May/June 1988).

⁹⁶ Children's Television Report and Policy Statement, 50 F.C.C. 2d 1, 15 (1974) (paragraph 47).

difficulties" in children's television and a federal court remanded a recent case in which the Commission appeared to renounce this approach. Action for Children's Television v. F.C.C., 821 F.2d 741, 747 (D.C. Cir. 1987).

For the above reasons, the purpose of effectively identifying sponsors of "feature" films will only be served by requiring announcements more carefully-tailored than those now required for television programming. Such requirements would be consistent with the purpose of section 317 and its implementing regulations "to require that the audience be clearly informed that it is hearing or viewing matter which has been paid for, when such is the case, and that the person paying for the broadcast of the matter be clearly identified." In Re Matter of National Broadcasting Co., 27 F.C.C. 2d 75 (1970) (emphasis added). While refraining from specifying exact wordings of sponsorship identifications, the Commission has emphasized that announcements should be in language "understandable to the majority" of viewers and should be legible to, and on the screen long enough to be read by, the "average viewer." Id. at 76; Application of Sponsorship Identification Rules, 66 F.C.C. 2d 303, 305 (1977).

We believe that the announcement should be conspicuous and be placed so as to maximize the viewers' ability to connect it with the particular sponsored material. These objectives would best be served by placing a written notice such as "Paid advertisement by ____" on the screen whenever the product or brand name appears. This type of notice would be analogous to print media's use of the

word "Advertisement" above ads that readers may confuse with editorial matter. Any announcements should be shown in large clear print (say, as large as that used for subtitles during foreign-language scenes) that remains on the screen for a period long enough to allow reading and comprehension.

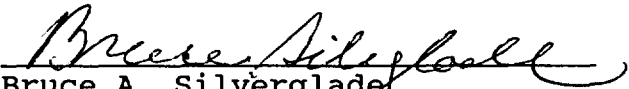
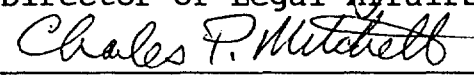
CONCLUSION

Current movie industry practices compel rescission of the waiver exempting "feature" films from the statutory sponsorship identification requirements. The rationale behind the waiver is no longer valid, because there exists abundant and clear evidence of the kind the Commission lacked twenty-five years ago. The Commission should exercise its authority to prohibit practices indistinguishable from those that it has already determined are contrary to the public interest.

Withdrawing the waiver would not drastically change Commission policy. It would only modify the rules to reflect changes in industry practice, and keep a promise to "maintain a careful and continuing surveillance of industry practices" and to

take "whatever action is deemed necessary as a result or future developments." 34 F.C.C. at 842. The Commission should welcome this opportunity to take the action which is clearly in the public interest.

Respectfully submitted,


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